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No. 04-741

In the Supreme Court of the United States

RICHARD A. CULBERTSON, PETITIONER

v.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

WILLIAM KANTER
MICHAEL E. ROBINSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Social Security Act provides that "[t]he Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter," and that, "whenever the Commissioner * * * makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim." 42 U.S.C. 406(a)(1).

The question presented is whether mandamus jurisdiction is available to review the reasonableness of a fee award committed to the Commissioner's discretion under Section 406(a)(1) if the Commissioner has decided not to establish a uniform maximum attorney's fee by rule or regulation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unreported. The opinion of the district court (Pet. App. 7a-9a) and the report and recommendation of the magistrate judge (Pet. App. 10a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2004. The petition for a writ of certiorari was filed on November 29, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 206(a)(1) of the Social Security Act provides, in relevant part:

> The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter, and any agreement in violation of such rules and regulations shall be void. Except as provided in paragraph (2)(A), whenever the Commissioner of Social Security, in any claim before the Commissioner for benefits under this subchapter, makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.

42 U.S.C. 406(a)(1).

Paragraph (2)(A), to which the above-quoted provision refers, provides:

> [I]f—(i) an agreement between the claimant and another person regarding any fee to be recovered by such person to compensate such person for services with respect to the claim is presented in writing to the Commissioner of Social Security prior to the time of the Commissioner's determination regarding the claim, (ii) the fee specified in the agreement does not exceed the lesser of—(I) 25 percent of the total

amount of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title), or (II) $4,000,[1] and (iii) the determination is favorable to the claimant, then the Commissioner of Social Security shall approve that agreement at the time of the favorable determination, and (subject to paragraph (3)) the fee specified in the agreement shall be the maximum fee. The Commissioner of Social Security may from time to time increase the dollar amount under clause (ii)(II) * * * .

42 U.S.C. 406(a)(2)(A).

Subsection (a)(4) provides, in relevant part:

[I]f the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Commissioner of Social Security shall * * * certify for payment out of such past-due benefits * * * to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits * * * .

42 U.S.C. 406(a)(4).

20 C.F.R. 404.1725(b)(2) provides:

Although [the agency] consider[s] the amount of benefits, if any, that are payable, [it] do[es] not base the amount of fee [it] authorize[s] on the amount of the benefit alone, but on a consideration of all the factors listed in this section. The benefits payable in any claim are determined by specific provisions of law and are unrelated to the efforts of the

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[1] The Commissioner increased this amount to $5300 effective February 1, 2002. 67 Fed. Reg. 2477.

representative. [The agency] may authorize a fee even if no benefits are payable.

In addition, 20 C.F.R. 404.903 provides, in relevant part:

> Administrative actions that are not initial determinations may be reviewed by us, but they are not subject to the administrative review process provided by this subpart, and they are not subject to judicial review. These actions include, but are not limited to, an action—
>
> * * * * *
>
> (f) Determining the fee that may be charged or received by a person who has represented you in connection with a proceeding before us.

20 C.F.R. 404.1720(d)(1) provides, in relevant part:

> [The agency] will review the decision [it] made about a fee if either you or your representative files a written request for the review at one of [the agency's] offices within 30 days after the date of the notice of the fee determination. * * * An authorized official of the Social Security Administration who did not take part in the fee determination being questioned will review the determination. This determination is not subject to further review.

Section 205(h) of the Social Security Act provides, in relevant part:

> No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 * * * of title 28 to recover on any claim arising under this subchapter.

42 U.S.C. 405(h).

STATEMENT

1. Petitioner is an attorney who represented Brett Beers, Linda Fuller-Gill, and Mary Hollenbach before the Social Security Administration (SSA) with regard to their claims for disability benefits. Pet. App. 11a. Each of the claimants had entered into a fee agreement with petitioner in which they agreed that if the SSA favorably decided their claim, petitioner would receive 25 percent of any award of past-due benefits as an attorney's fee. *Id.* at 11a-12a. There is no evidence, however, that petitioner submitted the fee agreements to the SSA before the Commissioner's determination on the merits of each claim. *Id.* at 17a. See 42 U.S.C. 406(a)(2)(A).

All three of the claimants were awarded past-due benefits in SSA administrative proceedings. Pet. App. 12a. Petitioner alleged that 25 percent of those awards amounted to $11,022.50 as to Beers, $5,650.75 as to Fuller-Gill, and $13,708.62 as to Hollenbach. *Ibid.* The fees approved, however, were $4200, $3000, and $6000, respectively. *Ibid.*

2. Petitioner filed suit in the United States District Court for the Middle District of Florida asserting jurisdiction under the Mandamus Act, 28 U.S.C. 1361, and seeking "to compel the Commissioner to award fees in the amount agreed to by [petitioner's] clients" in lieu of the amounts that the Commissioner had determined to be reasonable. Pet. App. 15a. Petitioner also sought declaratory relief under the Declaratory Judgment Act, 28 U.S.C. 2201, and "reference[d]" the Administrative Procedure Act (APA), 5 U.S.C. 704. Pet. App. 15a; see *id.* at 21a. The Commissioner filed a motion to dismiss the complaint for lack of jurisdiction. *Id.* at 11a. The matter was referred to a magistrate judge who treated the motion to dismiss as a motion for summary judgment. *Id.* at 16a.

The magistrate judge recommended that the Commissioner's motion to dismiss be granted. Pet. App. 10a-19a. The magistrate stated that it was "undisputed" that petitioner "did not proceed under the expedited provisions of Section 406(a)(2)," which can require a fee award in the amount reflected in an agreement between the attorney and the claimant. *Id.* at 17a. Instead, petitioner proceeded under Section 406(a)(1), "which places the discretion to determine the 'reasonable fee' in the Commissioner." *Ibid.* Because the determination at issue was "left to the discretion of [the] agency," the magistrate judge concluded that "it [was] not properly the subject of a mandamus action." *Ibid.*

The magistrate judge further determined that because "[n]either the Declaratory Judgment Act nor the [Administrative Procedure Act] are independent sources of subject matter jurisdiction[,] * * * to the extent that [petitioner's] claims are based on these statutes, the motion to dismiss for lack of subject matter

jurisdiction should also be granted." Pet. App. 18a. The magistrate judge, however, "recommend[ed] that the Court give [petitioner] leave to file an amended complaint" to state a proper claim. *Ibid.*

Petitioner filed an amended complaint on July 25, 2003, "[t]he same day that the [District] Court adopted the Report and Recommendation." Pet. App. 8a. Petitioner failed, however, "to allege any new grounds of federal jurisdiction." *Ibid.* Citing *Buchanan* v. *Apfel*, 249 F.3d 485 (6th Cir. 2001), the district court held that, "absent some colorable claim that: 1) the Commissioner's actions were egregious or shocked the conscience, * * * or 2) the Commissioner failed to comply with her own regulations, * * * the Court has no basis to review the Commissioner's award of attorney's fees pursuant to 42 U.S.C. § 406(a)." Pet. App. 8a (citations omitted).

3. The court of appeals affirmed. Pet. App. 1a-6a. The court "assum[ed] *arguendo* the availability of mandamus jurisdiction in an appropriate case." *Id.* at 4a. But it "agree[d] [with] * * * the district court that mandamus jurisdiction is unavailable in the instant case to review the reasonableness of a fee award" because the "[d]etermination of a reasonable fee is an act committed to the discretion of the Commissioner." *Ibid.* (citing *Chicago Great W. R.R.* v. *ICC*, 294 U.S. 50, 60 (1935)). The court found that petitioner's amended "complaint sp[oke] to no alleged failure to apply the regulation factors," but only to "an alleged failure to 'properly consider' these factors." Pet. App. 6a. Accordingly, the court concluded that petitioner's complaint did not present an appropriate case for mandamus jurisdiction. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner argues that, because "the Commissioner has decided *not* to establish a maximum fee, the fee charged must be approved as long as it '*does not exceed 25 percent*'" of the claimant's past-due benefits. Pet. 11 (quoting 42 U.S.C. 406(a)(4)) (emphasis added by petitioner). That argument is without merit.

Section 406(a)(1) empowers the Commissioner to fix attorney's fees for services performed at the administrative level. See 42 U.S.C. 406(a)(1). Pursuant to that Section, the Commissioner "may" issue rules and regulations prescribing a maximum fee, *ibid.*, but nothing in that discretionary grant of authority requires the Commissioner to set a uniform maximum fee. See *Randolph* v. *United States*, 274 F. Supp. 200, 204 (M.D.N.C.), aff'd, 389 U.S. 570 (1968) (rejecting plaintiff's argument that the Secretary is required to prescribe maximum attorney's fees by rule or regulation, because "[t]o require the Secretary to prescribe rigid standards in the setting of attorney's fees would serve to straitjacket the Social Security Administration in an area where adaptability is a continuing necessity").

By contrast, the language directing the Commissioner to fix a reasonable fee is mandatory: The Commissioner "*shall* * * * fix * * * a reasonable fee to compensate [an] attorney for the services performed by him in connection with such claim." 42 U.S.C. 406(a)(1) (emphasis added). There is nothing in the Act that precludes the Commissioner from fixing a reasonable

fee in each case, which fee serves as the maximum fee in that case.

Section 406(a)(4) does not require the Commissioner to approve, in the absence of a prescribed, uniform maximum fee, any fee not in excess of 25 percent of past-due benefits. Such an approach would, in fact, be contrary to the Commissioner's duties as prescribed by her own regulations, which require a case-by-case determination of a reasonable fee. See 20 C.F.R. 404.1725(b)(2); 20 C.F.R. 416.1525(b). Cf. *Buchanan* v. *Apfel*, 249 F.3d 485, 492 (6th Cir. 2001).

Petitioner places great weight (Pet. 10-15) on the language in Section 406(a)(4), directing the Commissioner to "certify for payment out of [a claimant's] past-due benefits * * * an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits." But nothing in that language overrides or conflicts with the provision in Section 406(a)(1) that authorizes the Commissioner to "fix * * * a reasonable [attorney's] fee" in each case in which the Commissioner makes a determination favorable to the claimant. To the contrary, those provisions can both be given effect by interpreting them to authorize the Commissioner to fix a reasonable fee in every case, to make that fee the maximum fee that can be charged, and to require the Commissioner to certify that fee (to the extent that it does not exceed the 25 percent limit) for payment to an attorney out of the claimant's past-due benefits. See Pet. App. 3a; 42 U.S.C. 406(a)(1), (4). Petitioner's interpretation, by contrast, would effectively read out of the statute the Commissioner's authority to "fix * * * a reasonable fee" under Section 406(a)(1), and must therefore be rejected. See *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (it is "'a cardinal

principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'") (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)). The Commissioner thus has discretion to set a reasonable fee award.

2. The Commissioner's determination of a reasonable fee award is not a matter subject to judicial review. See 42 U.S.C. 405(h) (precluding judicial review except as authorized in the Social Security Act); 20 C.F.R. 404.903 (determinations regarding reasonable fees "are not subject to judicial review"); 20 C.F.R. 404.1720(d). In the district court, petitioner invoked three bases for subject matter jurisdiction: the Mandamus Act, 28 U.S.C. 1361, the Declaratory Judgment Act, 28 U.S.C. 2201, and the Administrative Procedure Act, 5 U.S.C. 704. Pet. App. 2a. The court of appeals correctly held that "mandamus jurisdiction is unavailable in the instant case to review the reasonableness of a fee award." *Id.* at 4a. Setting a reasonable fee award is a matter within the Commissioner's discretion. See pp. 8-10, *supra*. It is well established that mandamus will not lie to correct an agency's exercise of discretion. See *Chicago Great W. R.R.*, 294 U.S. at 60 ("Where judgment or discretion is reposed in an administrative agency and has by that agency been exercised, courts are powerless by the use of the writ [of mandamus] to compel a different conclusion."). Because Congress has conferred on the Commissioner, not on attorneys, the authority to determine a reasonable fee, petitioner does not have "a clear right to the relief requested" (Pet. 19) sufficient to justify the exercise of mandamus jurisdiction.

Likewise, the court of appeals correctly held—and petitioner does not now contend otherwise—that "neither the Declaratory Judgment Act nor the Administrative Procedure Act provide[s] an independent source of subject matter jurisdiction" to review the reasonableness of the Commissioner's fee award. Pet. App. 4a; see *Schilling* v. *Rogers*, 363 U.S. 666, 677 (1960) ("the Declaratory Judgments Act is not an independent source of federal jurisdiction"); *Califano* v. *Sanders*, 430 U.S. 99, 105-107 (1977) (APA confers no independent grant of subject matter jurisdiction to challenge agency action in district court).[2]

3. Petitioner's policy arguments do not warrant a different result. Petitioner argues, for example, that "[i]f the Commissioner does have the authority to establish case by case fees after the case is over, then any attorney who agreed to charge a fee in excess of that previously unknown limit is guilty of a misdemeanor." Pet. 15 (citing 42 U.S.C. 406(a)(5)). By its own terms, however, the provision cited by petitioner applies only when there is a maximum fee "prescribed by the Commissioner." 42 U.S.C. 406(a)(5). Thus, it does not criminalize any agreement reached between an attorney and his or her client prior to the time the Commissioner has prescribed a fee. In this regard, petitioner has not cited a single misdemeanor prosecution (nor are we aware of any) brought on the basis of a fee agreement negotiated prior to the date on which the Commissioner fixed a reasonable fee.

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[2] Petitioner correctly does not contend that his claim falls within the general federal question jurisdiction conferred by 28 U.S.C. 1331. The Social Security Act expressly bars suits "brought under section 1331 * * * of title 28 to recover on any claim arising under" the Act. 42 U.S.C. 405(h).

Nor is "a uniform maximum fee * * * important * * * to protect attorneys who represent claimants before the Commissioner, and thereby enable claimants to obtain quality representation." Pet. 16. The fact that the Commissioner has chosen not to prescribe a uniform maximum fee, and instead makes a case-by-case determination of the reasonable (and thus the maximum) fee in each case, does not make the decisionmaking process somehow arbitrary or unreasonable.

4. Petitioner also errs in contending (Pet. 20-22) that the decision of the court of appeals in this case conflicts with the decision of the Sixth Circuit in *Buchanan* v. *Apfel*, 249 F.3d 485 (2001). In *Buchanan*, the court held that, "despite our lack of jurisdiction to pass on the reasonableness of any fee awarded to Buchanan at the administrative level, * * * we do have jurisdiction to consider whether the Commissioner has failed to comply with his own regulations." *Id.* at 492. The question in *Buchanan* was whether use of a blanket fee cap limiting attorneys to 25 percent of past-due benefits recovered by the claimant "would be a violation of the Commissioner's duties, because such a cap cannot be reconciled with the full consideration of the factors specified in 20 C.F.R. §§ 404.1725(b) and 416.1525(b)." *Ibid.*

Here, petitioner does not point to a policy or course of conduct "that cannot be reconciled with" the specific requirements of the Commissioner's own regulations. Rather, petitioner's complaint alleges only a "failure to 'properly consider' [regulatory] factors." Pet. App. 6a. "At bottom," as the court of appeals held, petitioner's "challenge is to the amount of the fee he was awarded —a decision that is committed to the Commissioner's discretion and not subject to judicial review." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

WILLIAM KANTER
MICHAEL E. ROBINSON
Attorneys

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